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No. 97-1667

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

JAMES E. POWELL, et al.,

Petitioners,

vs.

STATE OF FLORIDA, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ROBERT A. BUTTERWORTH
Attorney General of Florida

LOUIS F. HUBENER
Assistant Attorney General
(Counsel of Record)

OFFICE OF THE ATTORNEY GENERAL
The Capitol, PL-01
Tallahassee, FL 32399-1050
(850) 414-3300

COUNSEL FOR RESPONDENTS

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QUESTIONS PRESENTED

Respondents submit that this appeal presents no more than two issues for review and would restate them as follows:

1. Whether the Eleventh Amendment bars a state employee's action against a State in federal court pursuant to the Fair Labor Standards Act ("FLSA") to recover allegedly unpaid wages.

2. Whether state employees can sue state officers for prospective injunctive relief pursuant to *Ex Parte Young* to halt alleged violations of FLSA when the Secretary of Labor has been designated, pursuant to 29 U.S.C. §211(a), to bring all actions to restrain violations of the Act.

For the reasons set forth in the statement of the case and argument, *infra,* respondents submit that petitioners' questions 2, 4, and 5 are not properly presented.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit (Pet. App. 1-3) is reported at 132 F.3d 677. The opinion of the district court (Pet. App. 4-12) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 9, 1998. The petition for a writ of certiorari was filed on April 9, 1998, and docketed on April 15, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Petitioner James E. Powell, plaintiff below, filed a complaint against the State of Florida in the United States District Court for the Southern District of Florida in March 1995 on behalf of himself and all other similarly situated employees of the State. Powell sought to recover allegedly due and unpaid overtime wages under the Fair Labor Standards Act, 29 U.S.C. §201 et seq. ("FLSA").

In November 1995 Powell filed a motion for leave to distribute notification of opt-in rights to similarly situated employees. The district court, by order of April 5, 1996, directed the State to file a response. In March 1996, before entry of that order, this Court rendered its landmark decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). On the State's motion, the district court permitted the State to amend its answer to raise the Eleventh Amendment defense recognized in *Seminole Tribe*. The district court also permitted petitioners to file an amended complaint to include a count for injunctive relief and to add Governor Lawton M. Chiles, Jr., and William Linder, secretary of the Florida Department of Management Services, as defendants in their official capacities.

Relying on *Seminole Tribe*, the district court held that the Eleventh Amendment barred petitioners' claim against the State for unpaid overtime wages. (Pet. App. 4 et seq.) It also ruled that under FLSA only the Secretary of Labor had the right to bring an action for injunctive relief. Accordingly, the court dismissed the complaint. (Pet. App. 11) The court decided no Eleventh Amendment defense to the opt-in motion but simply ruled that all pending motions were mooted by the dismissal. (Pet. App. 12) The Court of Appeals affirmed. (Pet. App. 1)

Petitioners' questions one and three are properly presented, but questions two, four and five are not.

Petitioners' second question presented for review does not pose an issue this Court may address because no Florida appellate court has ruled on the question of whether the State's sovereign immunity bars an action in state court under FLSA for unpaid overtime wages. The district court noted that 29 U.S.C. §216(b) authorizes an action in state courts of competent jurisdiction. Whether there is a state jurisdictional bar and whether the Supremacy Clause overrides that bar are not questions that have been decided in this case. Nor have petitioners sought a state court decision. Thus, petitioners' second question improperly seeks an advisory opinion.

The fourth question presented for review presumes in the absence of any record evidence that all of the States helped draft the 1985 amendments to FLSA and thereby collectively waived their Eleventh Amendment immunity. There is no record evidence that all States so acted or that Florida authorized any other state to act for it or that the States at any time consciously and intentionally acted in any way to waive their constitutional immunity.[1]

The fourth question also appears to assert the States may have waived their Eleventh Amendment immunity by "adopting the FLSA." It is not at all clear what this terminology means, but again there is no record evidence in this case that Florida has waived its Eleventh Amendment immunity.[2] What other states

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[1]In their argument (Pet. at 22) petitioners cite *Local 2203 v. West Adams County*, 877 F.2d 814, 821 n.10 (10th Cir. 1989), presumably as evidence of the states' "collective participation." The footnote indicates that all of seven state officials testified before committees of the House and Senate, none identified as representing Florida. There is no indication that those testifying held a commission from the other States authorizing the waiver of the States' constitutional immunity.

[2]Petitioners point out that Florida's Department of Management Services adopted various administrative rules as a result of FLSA. (Pet. 23, 24 and n.3) The rules do not waive Florida's immunity to suit in federal court. This court

have done to "adopt FLSA" is not a relevant consideration, and, in any event, the record is devoid of evidence to support this vaguest of assertions. Hence, the fourth question is not properly before this Court.

The fifth question asks whether the Eleventh Amendment is a defense or bar to sending similarly situated employees notice of their opt-in rights. Neither the district court nor the Court of Appeals ruled that it was. The district court simply ruled the motion to send an opt-in notice was moot in view of dismissal of the amended complaint.

ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE THE DECISION OF THE COURT OF APPEALS IS CORRECT AND DOES NOT CONFLICT WITH A DECISION OF THIS COURT.

A. There is No Conflict With *Seminole Tribe of Florida* or *Coeur d'Alene Tribe of Idaho*.

The decision of the Court of Appeals affirming the district court's dismissal of the amended complaint is so clearly commanded by *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), that petitioners' argument can only be understood as a barely concealed plea to overrule *Seminole Tribe*. There is no conflict between the decision below and *Seminole Tribe*, and petitioners make no direct argument for overruling that decision.

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has repeatedly recognized that a state waives Eleventh Amendment immunity only through the clearest statement of its intent to do so in its statutes or constitution. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 238, 241 (1985) ("in order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in *federal court*." (Emphasis the Court's) *See also Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (quoting *Murray v. Wilson*, 213 U.S. 151, 171 (1909)).

Nor is there any conflict with *Idaho v. Couer d'Alene Tribe of Idaho*, 117 S.Ct. 2028 (1997). Consequently, there is no reason for this Court to grant a writ of certiorari.

The petition does not contend that Congress was exercising any authority other than its Article I Commerce Clause power in enacting and amending FLSA. Thus, *Seminole Tribe* speaks directly to this suit against the State for unpaid wages and the State's assertion of its Eleventh Amendment immunity:

> Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting states. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.

517 U.S. at 72-73.

The meaning of this is quite clear. The Interstate Commerce Clause alone is not a sufficient basis for Congress to abrogate state sovereign immunity. Hence, irrespective of whether Congress intended to abrogate the states' Eleventh Amendment immunity, it has not acted, as it must, pursuant to a valid exercise of power. *See Seminole Tribe,* 517 U.S. at 55. Accordingly, as at least seven circuit courts of appeal have ruled (see Pet. App. 2), the Eleventh Amendment bars an action against a State under FLSA for unpaid overtime wages.

In the face of this unanimous authority, petitioners offer two arguments, one asserting the Court of Appeals' decision "may conflict" with *Seminole Tribe*, and one asserting conflict with the "concepts" of *Idaho v. Coeur d'Alene Tribe of Idaho,* 117 S.Ct. 2028 (1997). (Pet. 7,9)

Petitioners first suggest that the Court of Appeal's decision conflicts with an observation in a footnote in the *Seminole Tribe* decision, *see* 517 U.S. 72, n.16, to the effect that there is no established tradition in the lower federal courts allowing enforcement of the federal copyright, bankruptcy and antitrust laws against the States. Petitioners apparently wish to conclude from the footnote that if States have ever been sued under FLSA, Congress' lack of authority to abrogate the Eleventh Amendment under Article I does not foreclose this action. The Court's observation, however, was made simply in response to Justice Stevens' concern that copyright, bankruptcy and antitrust laws would no longer be enforceable against the States and is in tandem with the Court's statement that it was never widely thought that those laws abrogated the States' sovereign immunity to begin with. This is no basis for the assertion of conflict. *See* Stern et al., *Supreme Court Practice* §4.3 (7th ed. 1993) (conflict must be real or intolerable on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized).

Nevertheless, even assuming the majority intended to hedge its ruling in a footnote response to the concerns of a dissenting Justice, there is plainly no "established tradition" of enforcing FLSA claims against States in the lower federal courts. Indeed, in support of an "established tradition" petitioners cite six appellate decisions that span the gamut from 1993 to 1994. (Pet. 8) A more extended review of relevant cases demonstrates that actions against States under FLSA have historically been subject to varying pronouncements, and the States' suability under that act has always been fraught with uncertainty.

In *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 281 (1973), this Court held that FLSA contained no clear statement of Congress' intent to abrogate the Eleventh Amendment. Three years later, after Congress amended FLSA, this Court ruled that the Tenth Amendment barred application of FLSA to the States. *See National League of Cities v. Usery*, 426 U.S. 833 (1976), overruling *Maryland v. Wirtz*, 392 U.S. 183

(1968). Twelve years later, the Court overruled *National League of Cities* in *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1988). Then, in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), a plurality opinion suggested for the first time that Congress could abrogate the States' Eleventh Amendment immunity pursuant to the Commerce Clause, provoking the sharp dissent of four Justices.

There then followed a few years in which States were theoretically subject to FLSA claims, until *Seminole Tribe* overruled *Union Gas Co.* in 1996. The fact that there were a few such cases during that brief interlude cannot support the conclusion that there was ever an established tradition of enforcing FLSA wage claims against the States.

Relying on "the concepts expressed" in *Idaho v. Coeur d' Alene Tribe, supra,* petitioners further complain that they will have no remedy for unpaid wages if Florida courts refuse to hear their claims on the ground that Florida has not waived its sovereign immunity in state court. (Pet. 9) As indicated in the statement of the case, respondents submit this question is not properly before the court. Petitioners can point to no Florida appellate decision ruling that the State's sovereign immunity bars FLSA claims, and, indeed, have apparently not undertaken to obtain a state court ruling themselves. Tellingly, the most their petition can assert is their belief that Florida's sovereign immunity would "probably" bar FLSA claims. (Pet. 21, 24) Plainly, they are uncertain how Florida courts would rule on this question, just as they are uncertain whether the Supremacy Clause would override that immunity and compel Florida courts of general jurisdiction to entertain FLSA claims. (Pet. 10,11)

Having not sought a ruling in state court, however, petitioners are in no position to submit such a question to the Court in this proceeding. This Court does not address hypothetical issues or render advisory opinions. *See United Public Workers of America v. Mitchell*, 330 U.S. 75, 90 (1947); *United States v. Freuhauf*,

365 U.S. 146, 157 (1961).

There can be no conflict with *Idaho v. Coeur d'Alene Tribe* in any event. That decision was concerned only with the use of the fiction of *Ex parte Young*, 209 U.S. 123 (1908), as a means for the Coeur d'Alene Tribe to avoid Idaho's Eleventh Amendment immunity and gain control of, or possibly title to, state sovereignty lands, a result acknowledged to have as intrusive an effect on Idaho's sovereign interests "as almost any conceivable retroactive levy upon funds in [the state] Treasury." 117 S.Ct. at 2043. The Court's rejection of the Tribe's claim was not premised upon the availability of a state court quiet title action, but on the impact of the Tribe's claim on Idaho's sovereign interests. The *Ex parte Young* fiction did not apply where the relief sought was so clearly against the State of Idaho. Where the *Young* fiction is available, it provides a basis for injunctive relief only, not money from a state's treasury.[3]

B. Petitioners Are Not Entitled to Injunctive Relief Under *Ex parte Young*.

Petitioners contend that the "practical effect" of the decision of the Court of Appeals is to leave them a right but no remedy, and from this they conclude that, constitutionally, prospective injunctive relief under *Ex Parte Young* must be available to enforce the Supremacy Clause. Petitioners err in their premise and in their conclusion.

The Court of Appeals held, as have all other courts addressing

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[3]The thought underlying Part II.B of the principle opinion that petitioners seemingly rely on was that federal courts might not be obligated to entertain *Ex Parte Young* actions if there is an available state court forum. Only Chief Justice Rehnquist joined this portion of Justice Kennedy's opinion. Justice O'Connor pointed out that "[t]he principle opinion cites not a single case in which the Court expressly relied on the absence of an available state forum as a rationale for applying *Young*." 117 S.Ct. at 2045 (O'Connor, J., joined by Scalia, J., and Thomas, J., concurring in part and concurring in the judgment).

the issue, that under the provisions of FLSA only the Secretary of Labor may seek injunctive relief. (Pet. App. 2). The provisions of FLSA are clear that this is the Secretary's right exclusively, while employees may sue for legal liability, *i.e.*, minimum wages or overtime. *See* 29 U.S.C. §§211(a), 216(b) (1994). (Pursuant to § 216(b), employees may seek equitable relief only to effectuate the purposes of §215(a)(3). Petitioners have not sought such relief in this action.) Contrary to the implication of their argument, petitioners are not constitutionally bereft of a remedy. First, and most obvious, they could ask the Secretary of Labor to bring suit. Assuming the Secretary lacks the resources, as they contend, they could bring that fact to the attention of Congress, which could amend the law. The fact that Congress has chosen to limit the right to seek injunctive relief to the Secretary in no way implicates the Supremacy Clause. If petitioners have a right without a remedy it is not by virtue of the decisions of the federal appellate courts on this question.

Petitioners effectively ask the Court to rewrite the statutory scheme to give them a broader remedy than Congress intended. The same request was put to the Court and rejected in *Seminole Tribe*. *See* 517 U.S. at 74. The Court there explained that where Congress creates a remedial scheme for the enforcement of a particular federal right, the Court will not create a supplemental remedy against a federal officer, nor will it cast aside clear statutory limitations to permit an action against a state officer based upon *Ex Parte Young*. The Court further explained:

> Contrary to the claims of the dissent, we do not hold that Congress cannot authorize federal jurisdiction under Ex Parte Young over a cause of action with a limited remedial scheme. We find only that Congress did not intend that result in the Indian Gaming Regulatory Act.

Id. at 75 n. 17. As petitioners acknowledge, following this Court's decision in *Employees v. Missouri Public Health Dept.*,

411 U.S. 279 (1973), Congress acted quickly to make clear its intent to abrogate the States' Eleventh Amendment immunity and apply FLSA to the States. (Pet. 14-15) If so motivated, Congress can also amend 29 U.S.C. §211(a).

Finally, petitioners claim they are not seeking injunctive relief to obtain wages or reinstatement. (Pet. 15) Rather, they seek "to obtain reclassification or a change in rules applicable to them," relief which they argue is not foreclosed by the exclusive authority given the Secretary. (Pet. 15). The authority given the Secretary by 29 U.S.C. §211(a), however, is to bring "all actions" to restrain "violations of the Act." If current classifications or Florida rules are not in violation of the FLSA, there is no relief to be sought by anyone. If they are in violation, only the Secretary has the authority to sue for injunctive relief.

II. THE PETITION SHOULD BE DENIED BECAUSE PETITIONERS' POLICY ARGUMENTS FAIL TO SHOW ANY COMPELLING REASON FOR GRANTING A WRIT OF CERTIORARI.

As additional reasons for granting the writ, petitioners speculate about the possibility of state court decisions differing over FLSA; again complain, mistakenly, that they have a right without a remedy; and again assert that the *possible* lack of a state court forum means that the Supremacy Clause *must* trump the Eleventh Amendment. The first and third are based on speculative assumptions and the second is simply wrong.

Petitioners also suggest that because of some States' participation in the amendment drafting process and because Florida adopted certain administrative rules to implement its obligations under FLSA, the States have somehow collectively lost their Eleventh Amendment immunity. (Pet. 22-24) No legal authority supports this most curious contention. To the contrary, this Court has ruled that a State's participation in a federal program does not suffice to waive its Eleventh Amendment

immunity. *Edelman v. Jordan*, 415 U.S. 651, 673-674 (1974); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 238, 246-247 (1985). *See also Florida Dept. of Health and Rehab. Services v. Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (per curiam) (state's agreement to abide by federal law in administering program cannot be deemed an express waiver of Eleventh Amendment immunity).

As to the handful of state officials who testified or participated in the amendment process, the non-record material petitioners cite does not even vaguely suggest those participants were acquiescing on behalf of all States in a waiver of the States' immunity. Petitioners cite no authority in support of the notion that mere participation in the lawmaking process suffices to waive Eleventh Amendment immunity, or that one State's participation can waive the immunity of another, or that of a few the immunity of all. Indeed, such a suggestion reflects no understanding of our federalist structure, which preserved the sovereignty of the individual States. *See Gregory v. Ashcroft*, 501 U.S. 452 (1991). The chaotic idea that one sovereign state can lose its immunity because another participates in the federal legislative process, while novel, hardly presents a compelling issue in need of this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

LOUIS F. HUBENER
Assistant Attorney General
(Counsel of Record)

OFFICE OF THE ATTORNEY GENERAL
The Capitol, PL-01
Tallahassee, FL 32399-1050
(850) 414-3300